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STATE OF ALABAMA
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Competitive Bid Law – Exemptions –
Education, Boards of – Information Technology
– Vendors – Contracts

A proposed contract with a vendor that will provide software development, installation, project management, equipment, information security, testing support, resources, supplies, and delivery and maintenance service to comprehensively manage/operate the Board of School Commissioners of Mobile County (“Board”) may be exempt from requirements of the Competitive Bid Law if the Board determines the contract fits within an exemption found in section 16-13B-2 of the Code of Alabama.

Dear Mr. Arledge:

This opinion of the Attorney General is issued in response to your request on behalf of Board of School Commissioners of Mobile County.

QUESTION

Is a proposed contract with a vendor that will provide software development, installation, project management, equipment, information security, testing support, resources, supplies, and delivery and maintenance service to comprehensively manage/operate the Board of School Commissioners of Mobile County exempt from requirements of the Competitive Bid Law?

FACTS AND ANALYSIS

In your letter of request, you informed this Office that the Board of School Commissioners of Mobile County is considering entering into a contract with a single vendor that will provide extensive computer networking and software assistance for the entire school district. The Board consists of 59,000 students and operates 90 schools, a central office facility and a transportation facility. In the information provided to this Office, you stated the following:

Under the contract, the vendor would:

1. Provide software, customized to the Board's specific needs and integrated into the Board's existing computer systems and software by the vendor to provide:
 - a. District-wide web to print capability for remote print job submissions by teachers and staff;
 - b. A centralized online student registration portal with direct integration into the state mandated iNow Student Information System;
 - c. District-wide, browser-based document sharing, storage, access and security;
 - d. District-wide networked device connectivity and monitoring;
 - e. A district-wide internet fax system;
 - f. District-wide electronic student cumulative education records with direct integration into the state mandated iNow Student Information System;
 - g. Digital, on-line human resources information management, access, storage and "on-boarding"; and

h. Custom digital budgeting and purchasing information management, automation, access and storage.

2. Operate and manage

a. The Board's mail system and provide complete digital tracking;

b. The Board's centralized print center at which documents over a certain number of pages or over certain sizes would be prepared and printed via the vendor provided software, and delivered.

3. Design upgrades for the Board's document and information management system to increase efficiency and would identify and implement long term document and information management cost-savings measures.

Municipal and county boards of education are subject to provisions of the Competitive Bid Law found within sections 16-13B-1 through 16-13B-11 of the Code of Alabama. ALA. CODE §§ 16-13B-1 to 16-13B-11 (2012). Generally, the Competitive Bid Law requires that all expenditures of funds of whatever nature for labor, services, work or for the purchase of materials, equipment, supplies, or personal property involving \$15,000 or more, shall be made through a contract that has been openly and competitively bid. ALA. CODE § 16-13B-1 (2012). This contract may fit within three stated exceptions to the Competitive Bid Law found in section 16-13B-2 of the Code. These provisions state as follows:

(2) Contracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, *engineers*, consultants, certified public accountants, public accountants, *or other individuals possessing a high degree of professional skill* where the personality of the individual plays a decisive part.

. . . .

(10) Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids and *custom software*.

(11) Contractual services and purchases of commodities for which there is only one vendor or *supplier and contractual services and purchases of personal property which by their very nature are impossible to award by competitive bidding*.

ALA. CODE § 16-13B-2 (2012) (emphasis added).

Previously, this Office has determined that computer engineers fall under the professional-services exception when performing complex computer services. Opinion to Honorable G. Robin Swift, Jr., Director of Finance, State Department of Finance, dated January 26, 1990, A.G. No. 90-00121. To the extent that the contemplated contract requires the technical services of a person who possesses a computer engineering degree, or someone who is considered to be a computer engineer based on that person's technical knowledge or skill, then a contract with that person would not be required to be competitively bid pursuant to section 16-13B-2(2) of the Code.

Moreover, the Alabama Supreme Court has held that a contract for engineering services and equipment that are inextricably integrated does not have to be competitively bid. *Anderson v. Fayette County Bd. of Educ.*, 738 So. 2d 854 (Ala. 1999); *see also*, opinion to Honorable Thomas T. Gallion, III, Attorney, Montgomery County Commission, dated September 23, 2005, A.G. No. 2005-197.

This particular contract may be exempt from provisions of the Competitive Bid Law if the Board determines the software to be custom pursuant to section 16-13B-2(10) of the Code. ALA. CODE § 16-13B-2(10) (2012). This Office has previously determined that computer software that requires customizing and formulation by a professional may be considered "custom software," which is exempt from the bidding process. *See, generally*, opinion to Robert W. Ennis, IV, Tuscaloosa City Attorney, dated October 21, 1993, A.G. No. 94-00023 (stating that off-the-shelf software and modified software are not exempt from the bid law).

The extent to which the software is modified to meet the specifications of the purchaser is a key factor in determining whether the software should be considered "custom." *Id.*; opinion to Honorable Gary C. Sherrer, Attorney,

Houston County Commission, dated March 16, 1999, A.G. No. 99-00139 (noting that “software” that will require substantial creative work by a professional/vendor to comply with unique specifications could constitute “custom software”).

As noted earlier, the contract in this matter contemplates the purchase of both hardware and software. Pursuant to section 16-13B-2(11) of the Code, contractual services and purchases of personal property are not required to be competitively bid in instances where the very nature of the personal property (or goods) and contractual services are impossible to award by competitive bidding. ALA. CODE § 16-13B-2(11) (2012). In analyzing a similar provision, this Office noted the following when determining whether a contract may be exempt due to the nature of the goods and services:

In order to have a competitive bid, the owner must be able to prepare plans and specifications that are sufficiently definite to allow potential bidders to prepare bids intelligently and on a comparison basis. When that is not possible, competitive bids are not possible.

Opinion to Honorable Robert L. Childree, Office of State Comptroller, dated March 10, 2009, A.G. No. 2009-052, at 4 (*citing* opinion to Honorable S. Richardson Hill, Jr., M.D., President, University of Alabama in Birmingham, dated June 30, 1981, A.G. No. 81-00443 (internal citations omitted)).

Your request indicates a need to purchase both hardware and software that will integrate with current devices and new devices over different campus locations. Specifications regarding the possible software modifications or various hardware needs may be difficult to express. If the Board determines that the nature of the goods and services to be obtained is incapable of being bid, this contract would be exempt from provisions of the Competitive Bid Law. *See, generally*, opinion to Honorable Roy W. Williams, Jr., Attorney, E-911 Board of Commissioners for Cullman County, dated May 12, 2015, A.G. No. 2015-044.

Based on the foregoing, it is the opinion of this Office that the Board of School Commissioners of Mobile County may contract with a vendor outside of the requirements of the bid law for the stated services outlined above if the Board determines that the services offered by the vendor properly fit within one or more of the exemptions offered by section 16-13B-2 of the Code of Alabama.

It should be noted that state law requires state entities to issue requests for proposals to procure professional services that fall under the exception to the Competitive Bid Law. ALA. CODE § 41-16-72(4) (2013). State law also requires state entities to limit contracts for professional services to that portion of a contract relating to the professional services provided. *Id.* There are no comparable provisions for county boards of education. Nothing in state law, however, prohibits a county board of education from issuing requests for proposals. Accordingly, the Board of School Commissioners of Mobile County may issue requests for proposals regarding the contemplated vendor contract.

CONCLUSION

A proposed contract with a vendor that will provide software development, installation, project management, equipment, information security, testing support, resources, supplies, and delivery and maintenance service to comprehensively manage/operate the Board of School Commissioners of Mobile County may be exempt from requirements of the Competitive Bid Law if the Board determines the contract fits within an exemption found in section 16-13B-2 of the Code.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH

Chief, Opinions Division